

Brussels, 5 June 1961

Summary in note form of an address by  
M. LELEUX - Legal Advisor,  
Legal Service of the European Executives

I

HOW DOES EUROPEAN LEGISLATION COME INTO BEING?

I. The legal system of the Treaties (especially EEC) as a source of law.

A. The essentially novel character of the Communities from the legal point of view:

- (1) The setting up of common legal provisions directly applicable as domestic law within the Member States.
- (2) The transfer to the Community's Institutions of the power to pass provisions in addition to those found in the Treaty.

Inside the ECSC: sector limited, mainly implementing rules; the Treaty itself often gives rulings in detail.

EEC: a vast field of legal and economic relationships; regulations complete the structure set up by the Treaty.

B. Sources of this Community law:

- (1) The Treaty: Here we must distinguish between the provisions binding solely the Member States (e.g., provisions re customs tariffs) and the "self-executing" provisions directly applicable to the nationals of several countries without further action being taken by the State (e.g., Article 85 on the prohibition of agreements).

- (2) The most novel aspect: legal acts passed by the common Institutions such as the Council, the Commission and the Parliament.

Powers are specific - not residual - carefully delimited in scope and with rigid procedural requirements for their exercise. But these powers greatly exceed - (much more than in the ECSC) - the mere application of provisions laid down in the Treaty itself. The Treaty, owing to the wide scope of its objects, often confines itself to establishing certain aims and leaves the elaboration of what we might call "Community" legislation itself to the Institutions: this is strikingly apparent when we come to the elaboration of common policies on agriculture, transport and foreign trade; also in the free movement of workers (Article 49) and the system governing competition (Article 87).

- C. What are the legal acts that can be passed by the Institutions (Article 189)?

(1) Regulations

"Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State."

This is the type of act which interests us most as regards European legislation, being in itself, without need of further implementation by the States, a valid law-making act.

A regulation has the same effect as the provisions of the Treaty itself and from the point of view of its legal effect is the same as that of a law.  
It is an amplification of the Treaty.

(2) Directives

"Directives shall bind any Member State to which they are addressed, as to the result to be achieved, while leaving to domestic agencies a competence as to form and means."

It follows that directives do not constitute legal provisions applicable like domestic law in the Member States. Their importance, however, should not be under-estimated, as they can have a profound influence on national legislation.

Disadvantage: No guarantee of absolute uniformity of legislation in the six States.

Advantage: The measures laid down can be adapted to the peculiarities of the various legal systems.

- (a) Decisions are thus particularly appropriate for the implementation of the chapters of the Treaty dealing with matters regulated in different ways by the various Member States and in accordance with basic concepts which often have little in common: the most typical example is that of the right of establishment.
- (b) Decisions have a fundamental part to play in bringing closer together legislation in the various fields covered by the Treaty (Articles 100 and 101).

### (3) Decisions

"Decisions shall be binding in every respect for the addressees named therein."

A binding rule, then, in all respects but not "directly applicable" as is a legal provision. We must, however, make the following distinction:

- (a) When addressed to States, decisions, if the need arises, must be incorporated by these States into their domestic legislation.

When addressed to a State, the decision makes it possible to give much fuller details required than is possible with directives.

- (b) When addressed to individuals, it is by nature "self-executing" (but, in this case, its constituent elements cannot be legal rulings; the decision is then simply an administrative act).

Decisions, then, are much more executive measures for the applications of particular rules contained in the Treaty, or, alternatively, they are measures addressed to individuals.

We may omit recommendations and opinions, which are not binding.

D. The choice between these legal acts

Sometimes the Treaty states which kind of act is to be used: either a regulation, a directive or a decision.

Sometimes the Treaty expressly permits a choice between the different acts: e.g., Article 49, Article 87 (regulation or directive), Article 97 (directive or decision), Article 43 (2) (regulation, directive or decision). Most often the choice is left to the Institutions (in these cases the terms used are "fixes", "specifies", "decides" or "lays down", "determines", "establishes"). But in this choice, the discretionary powers of the Institutions are limited by the general principle that the most appropriate type of instrument must be chosen, and that, though sufficient to attain the object aimed at, the instrument must not impose on those thereby affected any constraint out of proportion with its purpose, and must not unnecessarily interfere with domestic legislation.

Sometimes the choice between the use of a regulation and a decision is a delicate matter. An important point to be taken into consideration is the nature of the party to whom it is to be addressed: if it is thought sufficient that the rule should bind only the Member States, preference must be given to the decision.

On the other hand, it is unavoidable, for the sake of uniformity, that provisions which are not self-executing should be included in one regulation, although if taken separately they would have needed a directive or a decision: if rules are being laid down for a specific field, it would not be good practice to adopt a series of separate acts. Hence, simple instructions to the Member States may be included in a regulation, if rules for direct application are being drawn up at the same time.

#### E. Acts "sui generis"

The Institutions may also be called upon to pass acts which are "sui generis", that is to say, which do not fall within those listed in Article 189.

Examples: internal decisions (for budgets) - decisions for applying to Algeria such of the Treaty's provisions as are not "immediately applicable" (Articles 227 (2)) - the status of committees (Article 153) - the establishment of committees (e.g., decision of 9 March 1960 to set up a Committee on policy relating to Economic Trends on the basis of Article 103; official gazette of the Communities, 1960, p. 764) - decisions to amend the Treaty (Article 14, (7); Article 235) - general programmes (Articles 54 to 63).

However, with the exception of those whose effect is to amend or supplement the Treaty (especially Article 235), such acts are of no great interest from the point of view of the creation of Community law.

#### F. Respective powers of the Institutions in the drafting of these acts

Community law is generally derived from the joint work of the various Institutions.

- (1) In the institutional structure of the EEC, the policy-making power, the rule-making power and the reviewing-power (within the limits allowed

by certain provisions - e.g., Article 14 (7), Article 38 (3), Article 235) are based upon legislative enactments decided upon by the Council, but at the proposal, viz: at the initiative of, the Commission - the executive body.

Thus the Commission, as an independent body, prepares the decisions and ensures that the Community's interests shall be the basis of the measures adopted. The Commission takes part in all the Council's discussions.

In many cases, the Commission's proposal is acted on by the Council, by a qualified or a simple majority, and the number of such cases will increase as the implementation of the Treaty moves on from one stage to the next. The Council may not amend a proposal except by means of unanimous vote (Article 149).

According to the majority rule, a Member State cannot simply veto a step needed, and if it wishes to amend a proposal of the Council, it must do so by persuading the other Members to adopt its own point of view. This system leads therefore to concerted solutions, the more so as a decision, once adopted, is binding even on a State which has abstained from voting. (This is very different from the practice usually followed in international conventions of the traditional kind.)

The Council is thus a real institution and not just a conference of the Member States.

- (2) Moreover, for nearly all decisions involving the Community's policy-making and rule-making power, the Parliament, and often the Economic and Social Committee as well, are required to act. (This Committee is a consultative body consisting of representatives of the various categories of economic and social life.)

The role of the Parliament: Very important.

- (a) Contact with public opinion.
- (b) Indirect pressure on Governments exerted by the national parliaments.
- (c) Acts as a driving force, supports the Commission's work and supervises its activities (only the Commission is responsible to the Parliament) especially by means of oral and written questions to the Parliament.

The Commission (or its representatives) always have the right to attend the Parliament's debates.

The Economic and Social Committee also plays an important part in all fields where it is essential to obtain the opinion of the economic spheres to which the rules to be adopted will apply, particularly in matters affecting agriculture, labour, employment, transport, freedom of establishment, and the free supply of services.

- (3) Broadly speaking, the Commission may act alone in matters of a purely executive nature: technical provisions for the putting into effect of the Treaty, the application of Community rules to particular cases (e.g., safeguard clauses and exemptions), or ensuring that Community law is observed (e.g., application of the rules of competition).

In addition to this power to lay down implementing measures, the Commission has also to initiate proceedings before the Court of Justice for any infringements of Community law by Member States (Article 169).

- (4) Finally, the Council may also act alone in matters which concern essentially administrative matters or matters of internal organization (e.g., Statute of Service).

## II. How does this machinery work in practice?

Already a number of acts have been passed. It is certainly too early to say that the procedure and machinery of working are completely "run in", but it is possible, even now to learn something useful, from them.

A. Let us consider the work that was done in the preparation of the more important acts, in particular the regulations, viewed as sources of Community law.

### (1) Preliminary studies

- (a) Within the sphere of activity concerned the Commission's technical staff must study the legal and factual situation in the Member States.

To assemble the necessary material: requests for information are sent to the national administrative services.

- (b) The Commission's staff then prepare a preliminary draft.

The Commission is not obliged to consult anybody before putting a proposal to the Council, save for exceptional cases in the Treaty when it must obtain the opinion of the Economic and Social Committee before putting its proposal to the Council (Article 42, Article 43 (2)). But, in practice, it summons, from outside its own administrative staff, experts who are selected at its request by the Member States.

Within the Community, these specialists are known as "national experts" (they are nearly always high-ranking civil servants): at this stage of work they do not represent their Governments. (Occasionally preliminary studies on national legislation are entrusted to private specialists or institutes, University teachers, etc.)



- (c) The staff of the Commission submit their preliminary draft for consideration by the experts.

Very often meetings of experts appointed by the industrial and business circles concerned are also called. These experts represent not only both sides of industry (employers and workers), but also the interests of those working in the appropriate fields (e.g., those concerned with the right of establishment).

- (d) In the light of the opinions obtained in this way, the Commission's staff revise their preliminary draft. Often the national experts and the representatives of economic and social activity are again consulted on the revised text.

- (2) The text thus drawn up by the staff is then submitted to the Commission (the Commission has nine members) which discusses it and, either with or without further amendments, adopts the draft and transmits it, as an official proposal, to the Council.
- (3) The Council (By virtue of Article 151 of the Treaty, the Council in its rules of procedure has set up a Committee of Permanent Representatives, whose duty it is to prepare the Council's work.) Composed of diplomats having no special technical background, it has become very important. The Commission is represented at the meetings of this Committee. When the Treaty lays down that either the Parliament or the Economic and Social Committee or both must be consulted, the Council's practice so far has been to defer its own thorough examination of the proposal, and immediately pass the Commission's draft on for the opinion of these Institutions.
- (4) The Commission takes part in the proceedings of the Parliament and of the Economic and Social Committee

In the Parliament these proceedings are, in fact, conducted by the specialized section concerned. The Member of the Commission who is specially responsible for the field of activity in question<sup>1/</sup> or the high-ranking officials whom he appoints, attend all the meetings of the parliamentary committees and specialized sections in order to give any explanations needed and to answer questions.

- (5) Once the opinions of the Parliament and, in appropriate cases, of the Economic and Social Committee, have been adopted in plenary session (again, the Commission is represented), they are transmitted to the Council. Here, the Commission, taking note of any proposals for amendment which are contained in the opinions, may well revise its proposal in accordance with Article 149, and send back to the Council a new proposal replacing the previous one.

- (6) At the level of the Council

The organization of proceedings is in the hands of the Committee of Permanent Representatives.

Specialized working parties are set up consisting of high-ranking civil servants of each State, this time officially representing their Governments.

(They are often the same "national experts" who had been convened at the level of the Commission during preparatory proceedings.)

The Commission is represented at the meetings of these working parties. Very full discussions are held.

---

<sup>1/</sup> Within the Commission, for ease of working, responsibilities are distributed among the Members but decisions are always taken by the Commission as a whole, and authority is not delegated.

The working parties report back to the Committee of Permanent Representatives (which may refer once more to the working parties). Then follows the report by the Committee of Permanent Representatives to the Ministers themselves, who settle any final difficulties which are still outstanding. The Commission usually makes no changes in its proposal (which have been amended) until the working parties of experts have concluded their task. In the light of this work and of the attitudes adopted by the various national delegations, the Commission may then if necessary alter its text at the moment when it is submitted to the Council itself.

B. Lessons to be drawn from this procedure

- (1) It certainly has the disadvantage of being protracted and sometimes very cumbersome (the same discussions which have already taken place in preliminary meetings are sometimes repeated at the level of the Council with the same experts).
- (2) By contrast, it has considerable advantages:
  - (a) A thorough investigation is made of the problems which present themselves;
  - (b) A clarification of the initial difficulties;
  - (c) An imperceptible but nonetheless valuable move towards a common standpoint on difficult problems on the part of the Governments. This development is facilitated by contacts and discussions between national civil servants. The Commission is always represented at meetings of these civil servants and, during the discussions, defends the interests of the Community.

Moreover, the same national technical experts, over a period of three years, have already taken part on several occasions in the preparation of draft texts. They have thus come to know each other personally and are inevitably acquiring a Community attitude towards problems arising.

These, then, are the effects of the system adopted by the Treaty and referred to above: the need to find a concerted solution; the impossibility of departing from the Commission's proposals except by unanimous agreement. Consequently, the tone of the discussions is very different from that which often enough exists in international negotiations.

This is even more true at the level of the Committee of Permanent Representatives which consists of diplomats who have been meeting about once a week for the past three years, who have formed traditions in their manner of working and who are all firm believers in the future of European integration. Among them is to be found a most remarkable spirit of cooperation. . . .

- III. It is impossible here to give a detailed account of the role of the Court of Justice but it is important not to underestimate the extent to which the Court's decisions contribute to the formation of Community law: because in the Treaty there are few provisions of substantive law on which the Court can base its decisions. The written law of the Treaties offers, therefore, a wide field for the creation of a new law (based on Articles 164 to 174: "which give the Court jurisdiction over any legal provision relating to (the) application (of the Treaty)"). In interpreting particular provisions of the Treaty, the Court must respect the aims of the Treaty, and must at the same time define rules of Community law based upon the legal principles recognized in the six Member States.

CONCLUSION:

The method for creating a body of European law, which we find both in the machinery set up by the Treaty itself and in the actual working of that machinery, may well seem complicated and relatively weak.

However, if progress is to be made in this new endeavour of establishing a Community, the method adopted has the advantage of great flexibility. The Community embraces very wide areas of economic and social life, which until now have remained within the sphere of municipal law. The result of using this flexible method is that lasting and close cooperation of the common Institutions (particularly the Commission) and of the Governments is essential.

Because almost every day Community interests confront national interests, the responsible representatives of the National Governments almost unconsciously are coming to see problems and to act upon them in terms of an ever greater awareness of the existence of the Community and of its needs. These needs are more and more influencing both the thinking and the decisions of the Governments of the Member States - far more so than if an independent body had been set up possessing sole power to superimpose binding regulations upon the legal, administrative, economic and social systems of each State, without any psychological preparation for these having taken place.

At the present stage in the building of Europe (although this is, naturally, only a personal opinion), except for a possible improvement in one or more of its aspects (I am thinking in particular of the more important role which could be played by the Parliament), we may take the view that the very flexible framework set up by the Treaty is an instrument which is very well designed for harmonious progress towards the establishment of a Community law.